IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO 1212 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

KOLI MOHAN KARSHAN

Appearance:

1. Criminal Appeal No. 1212 of 1986

MR AJ DESAI, APP, for Petitioner No. 1

MR YOGESH S LAKHANI for Respondent No. 1-5

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 26/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The Appellant - State of Gujarat has filed this Appeal against the Judgment and order of acquittal dated 13.6.1986, passed by the learned Addl. Sessions Judge, Porbandar, in Sessions Case No.10 of 1986, whereby he acquitted all the respondents - accused for the offences u/ss. 147, 148, 149, 302, 114 of I.P.Code and under Sections 135(1) and 37(1) of the Bombay police Act.

2. It is the case of the prosecution that the incident in question took place on 16.9.1985 at 10.00 O'clock in the night, in the sim of village Javar where all the five respondents - accused, having common intention to kill deceased Mer Chhagan Lakha, caused his death by giving Gupti and stick blows. The respondent accused No.1 Koli Mohan Karsan was having Gupti with him at the time of incident, whereas remaining respondents accused were having simple sticks with them.

3. The complainant Mer Bhura Rama, claimed to be with the deceased Chhagan Lakha at the time of incident, lodged the complaint of the incident in question only on the next day i.e. on 17.9.1985 at 8.30 a.m. before the Police i.e. after almost 11 hours of the incident. After completing the investigation the Police filed charge-sheet against the respondents - accused for the aforesaid offences and they were tried by the learned Addl. Sessions Judge.

4. The prosecution has examined only one person as an eye witness i.e. complainant Mer Bhura Rama. The learned trial Judge, however, refused to place reliance on his evidence as, according to him, he was a got-up witness and could not have witnessed the incident. His evidence before the Court was not found to be trust-worthy by the learned Judge in view of the material contradiction in his evidence. The learned Judge has also considered the delay of almost 11 hours as fatal to the prosecution in this case. The learned Judge has also noticed that though the dead body of the deceased was brought to the Hospital at 2.25 a.m. in the mid-night hours by the closed relatives of the deceased, inspite of it they took almost 6 hours in lodging the FIR before the Police and the FIR was lodged by the complainant Bhura Rama only at 8.25 am on the next day of the incident for which no explanation was offered. The learned Judge also found that the evidence of Bhura Rama is not duly corroborated by the medical evidence. In view of these reasons the learned Judge gave benefit of doubt to the

respondents - accused and acquitted them for the offences, for which they were charged, by his impugned Judgment and order dated 13.6.1986, which is challenged in this Appeal.

5. The learned APP Shri Desai has taken us through the entire Judgment of the learned Judge as well as the reasons assigned by him for acquitting the respondents accused for the offences for which they are charged. He had also taken us through the material evidence of complainant Bhura Rama, but he has frankly conceded that in this case two views were possible and it cannot be said that the view taken by the learned Judge was unreasonable. In that view of the matter we find it difficult to interfere with the impugned Judgment and order of acquittal passed by the learned trial Judge, that too, almost after two decades of the incident.

6. It is no doubt true that conviction can be based even on the sole testimony of only one eye witness. It is also not doubt true that merely because Bhura Rama was closely related to deceased Chhagan that itself would not be a ground to discard his testimony, but the evidence of sole eye witness, closely related to the deceased, must be found to be trust-worthy and reliable. The medical evidence in this case totally destroys the evidence of so called eye witness Bhura Rama. As per the Post Mortem Note the deceased had taken food just one hour prior to the incident, whereas as per the evidence of the complainant Bhura Rama after having dinner in the evening they had gone to graze the cattle where they have gone to sleep. After about one hour when their eyes were opened they found that their bullocks were not there and, therefore, they went to the field of Arjan, but they did not find their bullocks. While they were returning, the accused chased them so that they started running. The complainant was running ahead of the deceased and accused No.1 gave blow with gupti to the deceased and thereafter other accused started to beat the deceased with sticks, whereas in his complaint he had stated that the deceased was first assaulted by other accused with sticks and because of that he felt down and thereafter accused No.1 - Mohan Karsan gave blow with Gupti on his back, which he had seen from some distance. When he started to run towards his house at that time all the five accused ran towards their field. After they went he had gone to the deceased Chhagan, who was suffering from pain. He thought that deceased was immediately required to be removed to the hospital, therefore, he went to his elder brother's Vadi and informed him. His brother Bachu told him to bring his father, so he went to his father and

informed him about the incident. Then they came to the place where Chhagan was lying. Then in the Bullock cart he was removed to the Porbandar Government Hospital, whereas in his evidence before the Court he stated that the accused were standing near deceased Chhagan and abusing and thereafter they left without causing any injury to him. If the accused decided to beat both, the deceased as well as the complainant, then we fail to appreciate that how the complainant would escape totally unhurt. He has admitted in his evidence that at the time of incident it was a dark night, still he claimed to have witnessed the incident which is not at all believable. Strangely, he stated in his evidence that from the voice of the accused he could identify them in the dark night. We can understand that person known can be identified by his voice even in the night time in the dark, but when five persons were there and all of them were abusing then we are not prepared to believe that he could identify them by their voice. In his cross examination he has tried to explain that how he escaped unhurt. He stated that he prayed for mercy, therefore, the accused allowed him to go which was not at all stated by him in his complaint. It is interesting to note that initially in his evidence in chief he has stated that with the Muddamal Article No.12 gupti the accused No.1 gave blow, but in his cross examination he has stated that it was not the same Gupti. Surprisingly he could see the length of Gupti and claimed that it was 3 " long. When a person, who is at a distance, could never be believed either to see the weapon or at least its size in the dark night. Much can be said about his conduct at the time of incident, though he claimed to be present with the deceased he had neither raised any shouts to save the deceased nor challenged the accused. In his complaint he had simply stated that Kolis of Javar assaulted Chhagan, but it seems that later on the names of accused were mentioned.

7. In view of the above evidence of Mer Bhura Rama when the learned Judge has refused to place any reliance on his evidence then certainly this Court will not take different view in this Appeal. More important part of it is that the incident in question took place on 16th, but the complaint was filed on the next day i.e. on 17th, but the same complaint was received by the learned JMFC, Porbandar on 19.9.1985 for which no plausible explanation is offered.

8. The incident in question took place in the field of Arjan Nathu, but surprisingly no panchnama was prepared by the Investigating Officer. For the reasons

best known, the prosecution has not examined Arjan Nathu.

9. Under the circumstances when the learned trial Judge has given cogent reasons for acquitting the respondents - accused and disbelieved the solitary eye witness then we can not interfere with such order in this acquittal Appeal.

10. In view of the above discussion, this Appeal fails and is hereby dismissed. Bail bonds of the respondents accused stand cancelled.

(B.J.Shethna, J.)

Date : March 26, 2004

(J. R. Vora, J.)

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